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7 *In pro per*

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

HOWARD HERSHIPS,
Plaintiff,

vs.

THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF CALIFORNIA, *et al.*,

Defendants.

Case No.: C 06-CV-6644 JF/RS

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION BY STEVEN T. KIRSCH TO
DISMISS COMPLAINT (28 U.S.C.
§1915(e)(2)(B))

Date of Motion: September 5, 2008
Time of Motion: 9:00 a.m.
Ctrm: #3, 5th Floor
Judge: The Hon. Jeremy Fogel
Case Filed: October 25, 2006
Trial date: None

I. INTRODUCTION

Defendant Steven T. Kirsch brings this motion to dismiss the claims of plaintiff Howard Herships based on the fact that Herships' action is a frivolous *in forma pauperis* action.

II. STATEMENT OF ISSUES TO BE DECIDED

1. Is Herships' *in forma pauperis* action frivolous such that it should be dismissed per 28 U.S.C. §1915(e)(2)(B)?

III. STATEMENT OF ALLEGED FACTS

Herships filed his Complaint on October 25, 2006, along with a Motion for Leave to Proceed *in forma pauperis*. (Docket numbers 1, 2) The Hon. Martin J. Jenkins granted Herships' motion on December 11, 2006. (Docket number 11)

The crux of Herships' claims is that Kirsch conspired with four Santa Clara County district attorneys¹ to prosecute a criminal case against Herships without probable cause and to deprive Herships of liberty and property without due process of law, so that Kirsch could obtain an advantage in a civil suit (FAC, ¶ 33, 37).

Herships recently requested that he be allowed to file a Third Amended Complaint alleging the same tired facts and arguments.

IV. ARGUMENT

A district court is *required* to dismiss "at any time" *in forma pauperis* complaints (either *sua sponte* or on defendant's motion) if it determines the action is frivolous. 28 U.S.C. §1915(e)(2)(B).

The court *need not accept as true* factual allegations in *in forma pauperis* complaints. It may reject "completely baseless" allegations, including those which the court finds "fanciful," "fantastic," or "delusional." *Denton v. Hernandez* (1992) 504 U.S. 25, 32.

¹ The district attorneys were dismissed by order of The Hon. Martin J. Jenkins on August 16, 2007, docket number 58.

1 **A. Herships' Claims Are Frivolous**

2 Herships, who has been declared a vexatious litigant by the California courts, filed this case
 3 after Kirsch filed a police report based on the keying of his car. For filing this police report and
 4 cooperating with the police and district attorney, Kirsch is accused of conspiring to violate
 5 Herships' civil rights. But Herships' claim that Kirsch conspired with eight persons to prosecute a
 6 criminal case against Herships without probable cause and to deprive him of liberty and property
 7 without due process of law, so that Kirsch could obtain an advantage in a small claims suit for his
 8 damages, is completely baseless.

9 First, Herships does not explain exactly which civil right(s) Kirsch conspired to violate. It
 10 cannot be the right to a fair trial, because the criminal trial hasn't been held. It cannot be the right
 11 to counsel, because Herships was given counsel by the court at his request. So what right was
 12 violated that gives rise to this complaint?

13 More importantly for this motion, Herships' theory as to how and why Kirsch violated his
 14 purported rights is completely baseless. Herships simply speculates a fanciful scenario that did not
 15 occur and that could not have occurred so that he can bring this baseless, extortionate action.
 16 Herships does not explain any credible motive for Kirsch, a police officer, two witnesses, four
 17 district attorneys, and a superior court judge to conspire to violate his rights. If we are to believe
 18 Herships, we have to believe that all of these persons agreed to deprive an indigent man of his civil
 19 rights. Why would they do this? What do all of them have to gain? And why would all of these
 20 people suddenly decide, all at the same moment in time, to go after Herships?

21 Herships claims this was done to extort reimbursement for Kirsch's damages from him.
 22 But Herships has no money (he filed *in forma pauperis*). And Herships does not even allege that
 23 Kirsch asked him for money. Moreover, Kirsch sued Herships for damage to his vehicle in small
 24 claims court and, based on a police report that quoted two eyewitnesses to the incident, Kirsch
 25 obtained a judgment against Herships for the amount of that damage. Herships appealed, and then
 26 he lost again on appeal. Therefore, the courts have already held that Herships was civilly liable for
 27 the damage. The idea that Kirsch and several others conspired to give him the additional leverage
 28 to collect this small amount of money is facially preposterous, as is the entire extortion

1 argument.

2 The rest of the allegations describe a similarly outlandish scenario without any factual or
 3 evidentiary basis. For example, Herships' allegations describe a procedure that exists only in his
 4 mind. When a police report is filed, the officer taking the police report makes a decision as to
 5 whether to refer the incident to the District Attorney's office for prosecution. That is always an
 6 independent determination of the police officer, who must weigh the evidence he independently
 7 obtains. The police officer independently determined the evidence was sufficient for referral to the
 8 district attorneys' office for prosecution as a felony, resulting in a warrant for Herships' arrest.
 9 Kirsch could not have had any control over the matter after making the police report, and Herships
 10 has no evidence but pure conjecture that a conspiracy occurred.

11 Simply stated, Herships' whole conspiracy theory is fanciful, fantastic, and delusional.
 12 Defendants did not enter into a conspiracy to deprive Herships of his civil rights in order to help
 13 Kirsch extort him. Rather, Herships is attempting to extort defendants. Indeed, Herships has a
 14 practice of filing such baseless extortionate actions. As just one example, Herships filed another *in*
 15 *forma pauperis* action in this Court in May 2007 against Foster City, a Foster City police officer,
 16 the Foster City Police Department, and two towing companies in which he made similar claims,
 17 including "Violations of Civil Rights" under 42 U.S.C. §1983. *See*, Kirsch's Request for Judicial
 18 Notice, served and filed herewith. The United States Supreme Court explained in *Denton v.*
 19 *Hernandez* that these types of *in forma pauperis* cases should not be allowed to proceed.

20 **V. CONCLUSION**

21 For the reasons set forth above, Kirsch respectfully requests that Herships' claims be
 22 dismissed with prejudice against him.

23
 24 Dated: August 1, 2008

REDENBACHER & BROWN, LLP

John C. Brown

25 By: _____

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 Attorneys for defendant
 STEVEN T. KIRSCH

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